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IN THE
COURT OF APPEALS OF INDIANA

EARNEST BELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A05-0605-CR-258
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-0307-FB-0037

April 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Earnest Bell appeals his convictions for two counts of Dealing in Cocaine,[1] a class B felony. Specifically, Bell claims that he is entitled to a reversal because the trial court erred in denying his request to proceed pro se and that fundamental error resulted when the prosecutor and a State's witness referred to Bell by his nickname of "Bully" or "Bully Bell" during the trial. Appellant's Br. p. 16. Finding no error, we affirm the judgment of the trial court.

FACTS

On December 12, 2002, Indiana State Police Detective Larry Mote and Cass County Sheriff's Detective Jeffery Schnepp met with confidential informant Terry Aldridge in preparation for a controlled buy of narcotics. Detective Schnepp searched Aldridge before giving him $150 and a radio transmitter. Detective Schnepp dropped off Aldridge about one block from Bell's residence in Logansport and Detective Mote maintained visual surveillance as Aldridge walked to Bell's residence. When Aldridge arrived at the residence, a woman informed him that Bell was not there. However, as Aldridge walked away, Bell arrived.

Aldridge entered Bell's vehicle and Bell explained that he did not have any cocaine with him but that they could drive to another location to obtain some. Bell drove to a nearby residence, and Aldridge gave him $150 in cash. Bell went inside the house and returned to the vehicle with some crack cocaine, which he handed to Aldridge. Thereafter, Aldridge met with the detectives and handed them the suspected crack cocaine that he had purchased from Bell. After a field test was performed, the cocaine was delivered to the Fort Wayne State

[1] Ind. Code § 35-48-4-1(A)(1).

Police Laboratory.

The following day, the detectives again met with Aldridge. After searching Aldridge, Detective Schnepp gave him $150 and transported him to the vicinity of Bell's residence. Aldridge met Bell at a Hardee's Restaurant and Bell then drove them to another location. Aldridge gave Bell the "buy money," and Bell went inside a residence and returned to the vehicle with three bags of a yellowish-white rocklike substance, which he gave to Aldridge. Tr. p. 77-79, 116. Aldridge then gave the detectives the suspected cocaine. Detective Mote field-tested the substance that tested positive for cocaine.

On December 19, 2003, Bell was charged with the above offenses. At an initial hearing on January 30, 2004, the trial court appointed counsel for Bell. At a pretrial conference conducted on March 30, 2004, public defender Leo Burns appeared with Bell. Thereafter, on July 19, 2004, Bell mailed a pro se "Verified Motion to Withdraw Defense Counsel from Case, and Notice that Defendant Wish[es] to Proceed Pro-se in His Cause." Appellant's App. p. 16-17. Bell alleged that Burns should not be permitted to represent him because, according to Bell, Burns previously worked as a prosecutor and had Bell convicted in a prior case. Bell further alleged that Burns refused to follow instructions and was not "preparing an adequate defense" in the case. Id. at 16. The trial court determined that the motion would be heard at a previously-scheduled pretrial conference on September 27, 2004. That hearing was subsequently continued until November 8, 2004, at which time the trial court denied Bell's motion.

Bell was not present at a subsequent pretrial conference, but public defender Bradley Rozzi appeared on Bell's behalf and requested a status hearing on May 9, 2005, which the trial court granted. On that day and at two subsequent pretrial conferences, Bell appeared and was represented by public defender Barbara Hendrickson. After further pretrial conferences were conducted where public defender Lindsey Ruby appeared for Bell, the trial court set a jury trial for April 12, 2006.

Ruby represented Bell at trial, and both the prosecutor and Aldridge referred to Bell as "Bully" or "Bully Bell," the nickname by which Aldridge knew him, at various times during the trial. Tr. p. 18, 24, 63. At the conclusion of the trial, Bell was found guilty as charged. He was subsequently sentenced to twenty years on each count, and the sentences were ordered to run concurrently. Bell now appeals.

DISCUSSION AND DECISION

I. Pro Se Request

Bell first contends that his convictions must be reversed because the trial court erred in denying his request to represent himself at trial. In essence, Bell claims that he was improperly denied the right to proceed pro se in accordance with the Sixth Amendment to the United States Constitution.

In resolving this issue, we initially observe that the United States Supreme Court has determined that a defendant has a right to self-representation under the Sixth Amendment to the United States Constitution. Faretta v. California, 422 U.S. 806, 810 (1975). The decision to proceed must be made knowingly and intelligently because, by asserting this right, the

defendant waives his right to the assistance of counsel. Id. at 807. The right to self-representation must be asserted both clearly and unequivocally. Dobbins v. State, 721 N.E.2d 867, 871 (Ind. 1999). As our Supreme Court observed in Dobbins:

> [the request] must be 'sufficiently clear that if it is granted, the defendant should not be able to turn about and urge that he was improperly denied counsel.' Meeks [v. Craven, 482 F.2d 465, 467-68 (9th Cir.1973)]. If the rule were otherwise, trial courts would be in a position to be manipulated by defendants 'clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules.' Id.

Id. at 871. Furthermore, our Supreme Court observed in Stroud v. State, 809 N.E.2d 274, 281 (Ind. 2004), that

> [s]everal jurisdictions have held that even after its assertion, "the right to self-representation may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether." Williams v. Bartlett, 44 F.3d 95, 100 (2d Cir.1994); United States v. Heine, 920 F.2d 552, 554-55 (8th Cir.1990); United States v. Weisz, 718 F.2d 413, 426 (D.C.Cir.1983), cert. denied, 465 U.S. 1027, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984); Brown v. Wainwright, 665 F.2d 607, 610-11 (5th Cir.1982); United States v. Bennett, 539 F.2d 45, 51 (10th Cir.1976), cert. denied, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976); Spencer v. Ault, 941 F.Supp. 832, 840 (N.D.Iowa 1996). Similarly, some jurisdictions interpret the Supreme Court's jurisprudence as requiring strict construction of the clear and unequivocal requirement. See Burton, 937 F.2d at 133; Weisz, 718 F.2d at 425-26. These are eminently sound policies. The right to counsel is a fundamental constitutional right and its abandonment should not be held lightly. Johnson v. Zerbst, 304 U.S. 458, 462-65, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The Faretta court, which held that criminal defendants have a right to represent themselves, imposed the requirements of a clear, unequivocal request, and a knowing, voluntary waiver of the right to counsel, out of concern that defendants could "conduct [their] own defense ultimately to [their] own detriment." 422 U.S. at 834, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562; see also Martinez v. Court of Appeal of California, 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (holding there is no constitutional right to represent

> oneself on appeal and noting that "[o]ur experience has taught us that a pro se defense is usually a bad defense" (quotations and citation omitted)).

As stated above, Bell's initial hearing was conducted on January 30, 2004. At that time, the trial court appointed a public defender at Bell's request. After several pretrial conferences where Bell appeared with counsel, he mailed a request to the trial court on July 19, 2004, requesting that he be permitted to proceed pro se. The substance of Bell's motion indicated his primary concern was that Burns, one of his public defenders, had prosecuted Bell on a previous charge and that Burns was not "preparing an adequate defense" in this case. Appellant's App. p. 16. Bell further alleged that his public defender had not followed his instructions and that there was "a direct conflict of interest in . . . the Public Defender Leo Bums [sic] representing defendant." Id. at 16-17.

When examining Bell's motion, the trial court could have reasonably concluded that Bell only mentioned that he wished to proceed pro se in order to avoid Burns's representation. Moreover, when the trial court questioned Bell regarding his motion, Bell never stated that he wished to proceed pro se. Tr. p. 5-6. Rather, Bell only asserted that he did not want Burns to represent him. Id. When Bell inquired about serving as co-counsel with Burns, the trial court indicated that it would consider the request at a future hearing if Bell filed a motion requesting to be appointed co-counsel. However, Bell never filed such a motion. Simply put, after Burns was replaced as defense counsel, there is no indication that Bell ever requested to proceed pro se. In fact, Bell filed only one request to represent himself, which could reasonably be construed as a request to have Burns removed from the case. And when the trial court questioned Bell about that request, Bell did not express a

desire to proceed pro se. Because Bell did not act in a manner consistent with his earlier—and only—request to represent himself, he acquiesced in the presentation of his defense by appointed counsel. See Osborne v. State, 754 N.E.2d 916, 921 (Ind. 2001). As a result, Bell's claim that he was denied the right to proceed pro se fails.

II. Bell's Nickname

Bell argues that his convictions must be reversed because the prosecutor and the State's witnesses resorted to "name calling" when Aldridge and the prosecutor referred to Bell by the nickname of "Bully" or "Bully Bell" during the course of the trial. Appellant's Br. p. 16. In essence, Bell claims that such "prejudicial characterizations" violated his fundamental right to a fair trial. Id. at 15-16.

At the outset, we note that Bell never objected to the use of his nickname at trial. Thus, his claim of error is waived. McCarthy v. State, 749 N.E.2d 528, 537 (Ind. 1997). However, in an effort to avoid waiver, Bell claims that the references to his nickname amounted to fundamental error. We note that the fundamental error doctrine is "extremely narrow" and only applies where the error is "so prejudicial to the rights of a defendant as to make a fair trial impossible." Trice v. State, 766 N.E.2d 1180, 1182 (Ind. 2002). The mere fact that error occurred and that it was prejudicial does not satisfy the fundamental error rule. Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied. To establish fundamental error, a defendant must show greater prejudice than ordinary reversible error because no objection has been made. Id.

In essence, Bell contends that the references to his nickname of "Bully" amounted to

attacks on his character and were made to portray him as "a bully and/or thug." Appellant's Br. p. 16. Thus, Bell argues that referring to him by this nickname created a "forbidden inference" that he had a criminal propensity and committed the charged act. Id.

In support of his argument, Bell directs us to this court's opinion in Oldham v. State, 779 N.E.2d 1162 (Ind. Ct. App. 2002). In Oldham, the prosecutor offered into evidence the defendant's business cards bearing the name "Rob Goddie" and phrases like "Tre Block" and "Dope City." Id. at 1171. The State also offered a photograph with text bearing the words "America's Most Wanted," "Wanted for robbery, assault, arson, jaywalking," "Considered armed and dangerous," and "Approach with extreme caution." Id. In reversing the defendant's conviction for murder on the grounds of fundamental error, we observed that when the defendant testified, the prosecutor "tried to use the business cards and the novelty photograph to paint [the defendant] as a dangerous criminal." Id.

Unlike the circumstances in Oldham, there is no evidence in this case that the prosecutor or the witnesses used Bell's nickname to insinuate to the jury that Bell must be a bully and a criminal. Indeed, there is no evidence showing that the name was used for any purpose other than to show that Aldridge knew Bell as "Bully Bell." Tr. p. 18, 24, 63-64. Thus, we reject Bell's contention that the State's purported "deliberate character attacks" violated his fundamental due process rights. Appellant's Br. p. 21.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.